

Notify
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL NO. 2013-02476-H

NOTICE SENT
02-10-14
T.J.S.
Miss A.G.
B.F.B.

BOSTON RETIREMENT BOARD,
Plaintiff

vs.

(AT)
CONTRIBUTORY RETIREMENT APPEAL BOARD and EDITH I. CARELL,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS

The plaintiff Boston Retirement Board ("BRB") brought this action against the defendants Contributory Retirement Appeal Board ("CRAB") and Edith I. Carell for judicial review of a decision by CRAB awarding surviving spouse death benefits to Ms. Carell, an elderly widow of a Boston Police Officer. BRB had previously denied such benefits to Ms. Carell, which decision was affirmed by the Division of Administrative Law Appeals ("DALA"). BRB has now moved pursuant to Mass. R. Civ. P. 12(c) for judgment on the pleadings. For the reasons stated below, BRB's motion is **DENIED** and CRAB's decision is **AFFIRMED**.

BACKGROUND AND PROCEDURAL HISTORY¹

Edith I. Carell was married to a Boston Police officer, Michael Carell, who died in 1968 from heart disease. Ms. Carell was approved for death benefits under G.L. c. 32, s. 9. Ms. Carell remarried on June 16, 1978 and the BRB terminated her benefits in accordance with s. 9(2)(a) as it was then written. That provision was known as the "remarriage penalty." Effective July 1, 2000,

¹The operative facts are not in dispute.

x

the legislature repealed the remarriage penalty (Chapter 159 of the Acts of 2000). On August 15, 2000, the Public Employee Retirement Administration Commission ("PERAC") issued a memorandum which stated that the elimination of the remarriage penalty did not apply to any benefits that were terminated prior to July 1, 2000, as Ms. Carell's had been. Since 2007, a number of bills have been filed in the legislature seeking to make eligible for benefits those whose benefits had been terminated prior to July 1, 2000 because of remarriage. None has been enacted.

On or about May 17, 2011, a state representative contacted BRB on Ms. Carell's behalf and inquired as to her eligibility for benefits.² On May 26, 2011, BRB informed Ms. Carell that she was ineligible because her surviving spouse benefits had been terminated prior to the repeal of the remarriage penalty. Ms. Carell appealed that decision and CRAB assigned the matter to DALA. After a hearing, DALA issued a written decision on June 15, 2012 affirming BRB's denial of benefits. That decision contained two errors: (1) in the summary section it stated that Ms. Carell "remarried before July 1, 2010," rather than July 1, 2000; and (2) in the concluding paragraph it stated that Ms. Carell's "remarriage took place after July 1, 2000," rather than before July 1, 2000. On July 11, 2012, Ms. Carell sent a letter to CRAB noticing her appeal of DALA's decision. That was beyond the applicable 15-day time limit under G.L. c. 32, s. 16(4) (even though the cover letter that accompanied the copy of the decision that was sent to Ms. Carell expressly stated that there was a 15-day appeal deadline). In a letter to DALA dated July 24, 2012, CRAB noted that it had received a "late appeal" from Ms. Carell and it pointed out the two errors in the DALA decision "so that DALA may consider whether it wished to issue a corrected decision, from which the petitioner

²In 2003 Ms. Carell was divorced. The parties agree that neither the fact nor the date of Ms. Carell's divorce is relevant to the analysis regarding her eligibility for benefits following the repeal of the remarriage penalty.

would have a further chance to appeal.” DALA accepted that invitation and on July 27, 2012 it issued an amended decision correcting the errors.³ On August 8, 2012, Ms. Carell filed a timely notice of appeal of the amended decision.

On April 3, 2013, CRAB issued its decision, reversing the decisions of DALA and BRB. On June 12, 2013, it denied BRB’s motion for reconsideration. This appeal by BRB followed. A non-evidentiary hearing was held on February 6, 2014.

DISCUSSION

Pursuant to G. L. c. 30A, § 14, BRB seeks review of CRAB’s decision awarding benefits to Ms. Carell. In so doing, BRB takes issue with CRAB’s interpretation of G.L. c. 32, s. 9, as amended effective July 1, 2000. BRB argues that CRAB erroneously gave retroactive operation to the remarriage penalty repeal provision that the legislature intended to apply prospectively only to those who had not been denied benefits prior to July 1, 2000 because of remarriage. BRB also asserts that Ms. Carell did not file a timely notice of appeal of DALA’s decision. The court will address each of these contentions, after first delineating the applicable standard of review.

Judicial review of an appeal from an agency decision is limited to the administrative record. G. L. c. 30A, § 14(5); see also *Cohen v. Board of Registration in Pharm.*, 350 Mass. 246, 253 (1966). The party challenging the decision of the agency bears the burden of demonstrating that the decision is invalid. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). With respect in particular to a decision of CRAB, it “may be set

³The amended decision bears a date of June 27, 2012, but it seems clear from the record that that is an error and that the correct date is July 27, 2012. This is so because the decision was amended in response to CRAB’s letter of July 24, 2012, and, in a letter dated July 30, 2012 that CRAB sent to Ms. Carell, CRAB stated that it had received the corrected DALA decision that same date (July 30, 2012) and that the decision was dated July 27, 2012.

aside only if based upon an error of law or unsupported by substantial evidence.” *Dube v. Contributory Retirement Appeal Board*, 50 Mass. App. Ct. 21, 23 (2000), quoting *Robinson v. Contributory Retirement Appeal Board*, 20 Mass. App. Ct. 634, 635 (1985). Where, as here, the decision in issue involves the construction of a statute, it is subject to *de novo* review, but the court typically defers to CRAB’s expertise and accords great weight to its interpretation and application of the statutory provisions it is charged with administering. *Haverhill Retirement System v. Contributory Retirement Appeal Board*, 82 Mass. App. Ct. 129, 131 (2012); *Mackay v. Contributory Retirement Appeal Board*, 56 Mass. App. Ct. 924, 925 (2002); *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 257 n. 10 (1996).

BRB’s principal argument is that CRAB erroneously applied the remarriage penalty repeal retroactively, contrary to the usual presumption against retroactive application of statutes and in the absence of any expressed legislative intent in favor of such retroactive application in this instance. The court disagrees with the fundamental premise upon which that argument is predicated, as it does not view CRAB’s interpretation of the statute, to which the court gives appropriate deference, to constitute retroactive application. True retroactive application would be a declaration that Ms. Carell is entitled to benefits from 1978 to the present, i.e., from the date of her remarriage and the termination of her benefits under the now-repealed remarriage penalty provision. CRAB did not declare that Ms. Carell was entitled to back-benefits for that 22-year period between 1978 and July 1, 2000. Indeed, it did not declare her eligible for back benefits from July 1, 2000 to the date of her reapplication in 2012, an additional 12-year period, although by its reasoning she would have been entitled to such benefits had she applied immediately following the repeal. Rather, CRAB held that at the time of her reapplication (which it permissibly construed her eligibility inquiry via her

legislator to be) she was entitled going forward to surviving spouse benefits under the law as it was then written. That is prospective application.

In support of its decision to that effect, CRAB observed that the repeal amendment contained no provision limiting its application to those who remarried after its effective date, whereas the legislature made other provisions of the act subject to specific limitations. It further noted that under the plain words of the statute, which state without qualification that benefits are payable to the surviving spouse so long as such member survives, Ms. Carell is eligible. The court agrees with that reasoning. It agrees as well that *Mackay v. Contributory Retirement Appeal Board*, 56 Mass. App. Ct. at 925, supports CRAB's interpretation of the statute. There the Appeals Court considered a 1990 amendment to G.L. c. 32, s. 1, that expanded the definition of "teacher" to include social workers, and thus made the latter eligible to participate in the teachers' retirement system. Pursuant to a separate provision, G.L. c. 32, s. 3(4), teachers could purchase credit for prior out-of-state teaching. *Id.* at 924-925. Overruling a CRAB determination to the contrary, the court held that two social workers whose out-of-state service predated the amendment were nonetheless entitled to all of the benefits available to teachers starting on the effective date of the amendment, including the purchase of credit for such prior service. *Id.* at 925. The court reasoned that the social workers' eligibility was determined as of the date of their application, and as of that date they were both eligible under the then-governing definition of "teacher." *Id.* at 926. The Appeals Court characterized such eligibility as prospective application of the amendment. *Id.* The same reasoning applies in the instant case.⁴

⁴BRB suggests that *Mackay* supports its position, while acknowledging that at first blush it "may seem persuasive for CRAB." It points to the Appeals Court's statement that a social worker who left employment the day before the effective date of the of the amendment would not

The court recognizes that its interpretation of the remarriage repeal act differs from that of PERAC. But it notes that the PERAC memorandum dated August 15, 2000, which BRB has cited, contains no explanation or reasoning whatsoever in support of its statement that the amendment "does not apply to any benefits that were terminated or reduced prior to July 1, 2000." Moreover, PERAC was invited by CRAB to submit a new memorandum in connection with the administrative appeal in this case and it did not do so. Consequently, the court can accord little weight to PERAC's views.

BRB also asserts that a number of bills have been introduced since 2007 that demonstrate the legislature's belief that the repeal of the remarriage penalty does not apply to one like Ms. Carell, who was denied benefits due to remarriage prior to the repeal. BRB suggests that these various bills, which seek to add specific language to G.L. c. 32, s. 9 to clarify that such individuals are eligible for surviving spouse benefits, reflect the understanding that the current law is to the contrary. But, as the CRAB correctly notes, given the PERAC memorandum and decisions by the BRB denying benefits to those like Ms. Carell, the bills might fairly be viewed as an effort to effectuate the original legislative intent that the repeal of the remarriage penalty renders such individuals eligible going forward for such benefits. Moreover, even if the bills do reflect some belief on the part of various

be entitled to participate in the program regarding credit for past out-of-state service because she was not a "teacher" at the time of her departure. *Mackay*, 56 Mass. App. Ct. at 926. But that is an unremarkable observation. More significantly, BRB points to the Appeals Court's statement that eligibility is determined by one's status on the date one applies, and it argues that Ms. Carell was an applicant in 1968 and that she did not become a new applicant by virtue of the passage of time and the change in the law. But BRB cites no authority that precluded Ms. Carell from reapplying as she did in 2012. BRB treated the legislative inquiry as an application and it issued a decision denying her benefits, to which appeals to the DALA and CRAB then followed. The court concludes that she was an applicant in 2012, and it is her status as of that date that determines her eligibility for surviving spouse benefits.

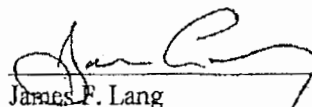
configurations of legislators seven and more years after the fact that those who enacted the amendment in 2000 did not intend it to apply to surviving spouses like Ms. Carell, such views are of limited utility in divining the original legislative intent. Certainly, they do not override the court's interpretation of the plain language of the act, which made Ms. Carell eligible for benefits from July 1, 2000 on.

Turning lastly to BRB's contention that the court is without jurisdiction because Ms. Carell did not file a timely notice of appeal of the original DALA decision, the court disagrees. While the importance of the two errors in that decision is debatable, it is of significance that CRAB brought them to the attention of DALA and DALA saw fit to issue an amended decision. It did so knowing that, in CRAB's view, Ms. Carell had not timely appealed the original decision but that the issuance of an amended decision would afford her the opportunity to appeal it. Ms. Carell then filed a timely notice of appeal of the amended decision. In holding that it had jurisdiction over Ms. Carell's appeal, CRAB reasoned that the amended decision corrected errors as to the date of Ms. Carell's remarriage vis-a-vis the effective date of the repeal of the remarriage penalty that were sufficiently substantive to permit an appeal. It further opined that the amended decision "clarified the reasoning of the decision and removed confusion about the central issue presented, retroactivity of legislation." It is a close call whether, in fact, the errors in question were sufficiently substantive such that the amended decision was not merely a reissuance of the original decision with two scrivener's errors corrected (in which case, no appeal would lie). But the court concludes, as did CRAB, that the amended decision was appealable and that the matter was properly before the CRAB.

ORDER

For the foregoing reasons, the plaintiff Boston Retirement Board's motion for judgment on

x
the pleadings is **DENIED** and the defendant Contributory Retirement Appeal Board's decision
awarding surviving spouse benefits to the defendant Edith I. Carrell is **AFFIRMED**.


James F. Lang
Associate Justice of the Superior Court

February 7, 2014